

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION**

BAYSIDE BEVERAGE CORPORATION

Employer

and

CASE 7-RC-22163

**LOCAL 406, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, AFL-CIO**

Petitioner

APPEARANCES:

**Brent D. Rector, Attorney, of Grand Rapids, Michigan, for the Employer.
Ted Iorio, Attorney, of Grand Rapids, Michigan, for the Petitioner.**

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, hereinafter referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:¹

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

¹ Both parties waived the filing of post-hearing briefs.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. Petitioner seeks to represent a unit of seven warehousemen, five delivery drivers, and four merchandisers who work at or out of the Employer's facility in Petoskey, Michigan. The Employer, contrary to Petitioner, would add eight sales employees to the unit.² I find that the record as a whole fails to buttress a finding that Petitioner's desired grouping is inappropriate. Despite some overlapping of duties, excluding salesmen has a rational basis in view of their predominant sales function, unique compensation scheme, greater earning power, separate reporting structure, and negligible interchange.

The Employer distributes wholesale beer and wine in northwestern Michigan. It has franchise agreements with alcohol manufacturers, whose wares arrive at the Employer's Petoskey facility by means of outside common carriers. The Employer's warehouse staff unloads in-coming product, checks and stores it, and prepares paperwork.

Customer accounts are classified as off-premises and on-premises; the former being licensed retailers, such as supermarkets and convenience stores, whose patrons consume alcoholic products off the retailer's property; and the latter being restaurants, taverns, and bars, whose clientele imbibe on the premises. On Mondays through Thursdays, sales employees visit customers in company-owned vehicles and solicit new orders, details of which they enter on their assigned laptop computers. They also solicit new business along their assigned routes.

Warehousemen, using load sheets reflecting that day's customer orders, pull inventory and, in the evening, load it onto the Employer's semi-trailers. The following morning, the Employer's route drivers depart in the trucks to deliver the

² The parties concur that office clerical employees, managerial employees, guards, and supervisors are properly excluded.

product.³ The assigned delivery and sales routes correspond, so that each driver normally delivers orders obtained by the same salesman.

Larger accounts permit or even expect Employer assistance in displaying and advertising product brands. About two years ago, the Employer created a new classification called merchandiser to satisfy this need. Within the Employer's workforce, merchandisers are now the ones who are chiefly responsible for checking on the cleanliness and appearance of delivered product, pricing it, rotating it so that older stock will be sold first, and "facing" it so that similar labels are grouped together in an attractive and eye-catching array. Merchandisers also seek the customers' assent for point-of-sale advertising such as table tents, reflective plaques, show cards, shelf-danglers, and displays. Larger accounts along a given driver/sales route are typically serviced by a particular merchandiser, who normally arrives later in the same day that the driver makes delivery. Smaller customer establishments typically waive the efforts of merchandisers and consequently fill shelves, price and rotate stock, and promote products on their own.

Merchandisers are not assigned their own company vans, as are salesmen, but travel in the warehouse van or their personal vehicles. During the busy season of May through August, they work five days per week, usually Monday, Tuesday, Thursday, Friday, and Saturday. There is no evidence that any other employees work Saturdays. For the remainder of the year, merchandisers work only four days per week. Their work hours were not disclosed.

Salesmen work Mondays through Fridays. All but one arrive at the Petoskey office an hour or two after drivers have left for the day, and an hour after the day-shift warehouse crew has begun work.⁴ On Mondays through Thursdays, salesmen do not usually encounter other employees until they return to the facility to deposit their company vehicles and leave for the night. Every Friday, however, sales employees attend a weekly meeting with merchandisers and managers, and devote the rest of the day to merchandising. This involves making and distributing marketing materials, or helping merchandisers construct displays either at the Employer's facility or the customer's shop. While engaged in merchandising activities on Friday at a customer site, a sales employee may see a driver, if one

³ In the busy summer season, special rush orders are taken early on Mondays and delivered later the same day. Otherwise, the pattern is that a driver makes delivery the day following a salesman's taking of an order.

⁴ The residence location of one sales employee makes it more practical for him to depart on his assigned rounds from home, and the Employer permits him to do so.

has been enlisted to deliver either the finished display, raw construction materials for the display, or pallets of product for placement in the display.

The Employer promotes its products at periodic special events such as an annual Polish Festival. Attendance at these affairs is mandatory for the sales staff and optional for other employee classifications. Those participating hang signage and banners, erect inflatable marketing toys, and tie off areas with pennants.

All delivery drivers and warehousemen report directly to Operations Manager Tim Wandrie, who in turn answers to General Manager Jack Coats. Merchandisers and wine salesmen report intermediately to, respectively, Merchandising Supervisor Kevin Friedenstab and Wine Sales Manager Jim Coats. Friedenstab and Jim Coats are under General Sales Manager George Muter, who, according to the Employer's organizational chart, is on a roughly equal supervisory footing to General Manager Jack Coats. General Sales Manager Muter and General Manager Coats are superintended by President Steven Arbaugh.⁵

When a salesperson is absent, his duties are assumed by either Merchandiser Jim Turk or Merchandising Supervisor Kevin Friedenstab. Turk seems to be a particularly adaptable worker, in that he also regularly makes extra deliveries and replaces absent drivers.⁶ Neither warehousemen nor drivers ever substitute for salesmen. Beer salesman Mike Rybinski made deliveries in a driver's semi-trailer on two occasions last autumn. In the last five years, however, no other salespeople have driven trucks while working in sales. Although warehousemen have asked salesmen in the past to assist in the warehouse at night, General Sales Manager Muter recently announced a policy against such requests. There is no evidence of temporary interchange between sales and non-sales employees other than as set forth above.

Seven of the eight incumbent salesmen voluntarily transferred into their current positions after previously working for the Employer in the non-sales capacities of driver, warehouseman, or merchandiser. The record does not reveal

⁵ Based on their authority to hire, fire, and discipline employees, the parties stipulated to the supervisory status of General Manager Jack Coats, General Sales Manager George Muter, Operations Manager Tim Wandrie, and Wine Sales Manager Jim Coats. I concur. No stipulation was obtained, or evidence adduced, regarding the authority of Merchandising Supervisor Kevin Friedenstab or President Steven Arbaugh.

⁶ In addition to Turk, a merchandiser, three warehousemen with the requisite commercial drivers' licenses also regularly substitute for absent drivers.

the reasons for the transfer requests, or whether requests to become salesmen have ever been denied.

Compensation for salesmen combines commissions and a base weekly salary of \$500. Commissions represent roughly one-half of their earnings. Because they are salaried, salesmen do not receive overtime pay. By contrast, the undisputed unit classifications are paid hourly, punch a time clock, and are eligible for overtime pay. The Employer describes drivers, warehousemen, and merchandisers as eligible for incentive or bonus pay, but there is evidence that no such awards have been made in the last four to six years. No workers other than salesmen are entitled to commissions. Pursuant to recent pay hikes, drivers earn \$14.77 per hour, while warehousemen and merchandisers are paid \$10.25 per hour. Annualizing the hourly wages for comparison purposes, warehousemen and merchandisers receive about 50% of an average salesman's salary, and drivers earn about 75%.

As per Michigan Liquor Control Commission (MLCC) regulations, any employee who delivers and collects money for alcohol is subjected to a background check and required to carry a MLCC license. This regulation applies to all of the Employer's salesmen, drivers, merchandisers, and some of its warehousemen. The Employer's other objective pre-hire qualifications for salesmen are that they possess valid drivers' licenses, are insurable, and have good driving records. Delivery drivers are required, and warehousemen are encouraged, to have commercial drivers' licenses. Only those employees with commercial drivers' licenses are randomly drug-tested. The Employer offers outside sales training courses to its sales staff and apparently to its non-sales staff upon request.

Drivers, salesmen, and merchandisers are given pagers with voice mail capability. While the devices theoretically permit workers to communicate with each other, it appears that they are used mainly by managers to contact employees. A message center at the Employer's Petoskey facility -- a wallboard with hooks -- allows employees to exchange orders, invoices, load sheets, and messages, and managers to distribute paychecks.

A single handbook of rules and regulations covers the Employer's entire workforce. All of the classifications at issue receive the same vacation, sick leave, holiday, §401(k) plan, and insurance entitlements. They also have use of a fuel card enabling them to purchase gas for their vehicles at retail pumps. There are no regular work meetings convening all of the classifications, but holiday parties bring them together. Yearly fishing trips sponsored by the Employer divide salesmen and merchandisers, who go in the fall, from drivers and warehousemen, who go in the spring. The sales staff is provided desks in the basement of the

Petoskey facility. Drivers and warehousemen work out of the building's third floor.⁷

About three or four times yearly, product manufacturers supply novelty items such as jackets to the Employer. As a practical matter, these gratuities are passed along only to the sales staff. Salesmen and merchandisers work in their own clothing. Drivers and warehousemen must wear uniforms, 66% of the cost of which is defrayed by the Employer.

Alone among the classifications at issue, salespeople have authority on their own to invite customers and prospects to lunch. The Employer does not grant salesmen a specific entertainment budget, but the record suggests that it will reimburse salesmen for such expenses. Merchandisers do not entertain customers.

Vacations are scheduled so that only one employee from each of the four classifications under discussion is on leave at a given time. According to the handbook, employees within a classification are chosen for layoff based on seniority as well as subjective factors such as work record and competency. The handbook also states that an employee from one classification may bump into another, provided he can do the work. There is no evidence that layoffs have occurred.

Resolution of unit composition issues begins with an examination of the petitioned-for unit. Only if it is inappropriate will alternative units be found. *Bartlett-Collins Co.*, 334 NLRB No. 76, slip op. at 1 (July 11, 2001). In determining whether the sought unit is inappropriate, the Board is guided by the principle that it need endorse only *an*, not the *most*, appropriate unit. *Morand Bros. Beverage Co.*, 91 NLRB 409, 419 (1950), enfd. on other grounds 190 F.2d 576 (7th Cir. 1951). Appropriateness normally depends upon community-of-interest factors such as mutuality of interest in wages, hours, and working conditions; commonality of supervision; degree of skill and common functions; frequency of contact and interchange; and functional integration. *Ore-Ida Foods*, 313 NLRB 1016 (1994). A union's desire is always a relevant, but must not be a dispositive, consideration. *E. H. Koester Bakery & Co.*, 136 NLRB 1006 (1962).

A unit combining drivers and warehousemen has long been held appropriate. *Big Buck Lumber*, 241 NLRB 639, 640 fn. 2 (1979). The Board also often accedes to a union's desire to carve salesmen from such units. *Associated Beer Depots*, 152 NLRB 412, 417 (1965); *Orkin Exterminating Co. of Kansas*, 136 NLRB 630, 640 and cases cited at fn. 14 (1962); *Standard Trucking Co.*, 122

⁷ The locus of merchandisers was not mentioned at the hearing.

NLRB 761 (1958); *Niagara Beer Distributors Assn.*, 108 NLRB 1571, 1573-1574 (1954). In *Plaza Provision Co.*, 134 NLRB 910, 911-912 (1961), the Board explained that employees who drive company vehicles as an incident of a primary sales function have interests more closely aligned with those of salesmen than drivers, production employees, or warehousemen. Accord, *E. Anthony & Sons*, 147 NLRB 204, 206 (1964).

While not squarely on point, *Koester Bakery* is instructive. There, a union wished to exclude driver-salesmen from a production and maintenance unit. The Board, holding that the issue would henceforth be analyzed on a case-by-case basis, found the exclusion appropriate, citing as factors that the employer had no other sales force, the driver-salesmen were salaried and on commission, they were under the control of the sales manager, they were permitted to cultivate new accounts, and they spent most of their time away from the plant. Here, the Employer's sales staff shares the same characteristics.

As *Koester Bakery* implies, the Board has long recognized the separate interests of salesmen. In *National Brands*, 81 NLRB 1163 (1949), a case presenting the converse of the instant matter, the union wished to exclude drivers, warehousemen, checkers, servicemen, and merchandisers (called advertising display men) from its sought unit of driver-salesmen. The Board upheld the union's petitioned-for unit, noting that the driver-salesmen were a homogeneous group whose duties and interests were clearly identifiable and distinguishable. *Id.* at 1165.

The Employer presented testimony that its salesmen, merchandisers, and drivers must comport themselves similarly because they share the common objective of cultivating customer good will to promote distribution. That selling and productivity goals harmonize, however, is a truism. The same claim of functional interdependence was deemed unpersuasive in *Koester Bakery*. Nor was the Board in either *Koester Bakery* or *Orkin Exterminating* prompted to include salesmen simply because, as here, fringe benefits were standard regardless of classification.

The Employer adduced evidence that its salesmen may rotate stock and fill shelves with product. They do so, however, mainly when the assigned driver or merchandiser has been remiss. Conscientiousness exhibited by a sales employee working on commission does not disguise his essential sales function. The Board excluded salesmen in *Niagara Beer Distributors*, despite their checking on drivers to assure that customers were being properly serviced and filling in for other employees during staff shortages.

The Employer's salesmen may make special deliveries, usually in company vans. However, the record is clear that salesmen deliver products only in infrequent emergency situations. Operating the large rigs driven by the Employer's professionally licensed drivers is not the normal province of the sales staff. Correspondingly, drivers and warehousemen never take customer orders. They have no incentive to do so because they will not receive a commission. As one driver explained at the hearing, he does not solicit orders because he doesn't "get anything out of it." The latter point makes the instant case a stronger candidate for exclusion than either *Associated Beer* or *Orkin Exterminating*, where the Board excluded salesmen from units of drivers, helpers, warehousemen, and/or service men, even though the drivers in *Associated Beer* and the service men in *Orkin Exterminating* were privileged to sell and obtain commissions.

Almost every sales employee formerly worked for the Employer as a merchandiser, warehouseman, or driver. Previous experience is not, however, a sales job qualification. The progression shown by the evidence is therefore voluntary, not mandated. That employees in other classifications aspire to sales positions suggests that selling possesses singular features more than it proves that all jobs are fungible. In *Orkin Exterminating*, supra, salesmen were not included in a unit of service men and drivers even though salesmen were former service men.

Of the classifications sought by Petitioner, salesmen share the closest community of interest with merchandisers. These two groups have regular contact on Fridays, are mutually superintended by General Sales Manager Muter, and occasionally cover each other in event of absence. On the other hand, only two merchandisers ever sell, and one is denominated a supervisor. Salesmen are salaried, earn commissions, and average far more compensation per year than merchandisers, who are paid hourly and are ineligible for commissions. Although they share a manager toward the top of the command chain, merchandisers and wine salesmen report to different intermediate figures. Salesmen are afforded their own company vans, laptop computers, and desks, perquisites not generally available to merchandisers. Unlike salesmen, merchandisers do not pay for customers' meals. Merchandisers support, while salesmen solicit, product orders. In sum, their purposes are interdependent but distinct. Compare *Liebman Breweries of New Jersey*, 142 NLRB 121, 124 fn. 10 (1963) (merchandisers who spent 75% of time as relief salesmen added to sales unit over union's objection).

6. Accordingly, I find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time drivers, warehouse employees, and merchandisers employed at and out of the Employer's facility located at 1008 Franklin Street, Petoskey, Michigan; but excluding sales employees, office clerical employees, managerial employees, and guards and supervisors as defined in the Act.⁸

Those eligible to vote shall vote whether they wish to be represented by Local 406, International Brotherhood of Teamsters, AFL-CIO.

Dated at Detroit, Michigan, this 5th day of March, 2002.

(SEAL) /s/ William C. Schaub, Jr.
William C. Schaub, Jr., Regional Director
National Labor Relations Board, Seventh Region
Patrick V. McNamara Federal Building
477 Michigan Avenue, Room 300
Detroit, Michigan 48226

440-1760-7260

⁸ There being no record evidence regarding Merchandising Supervisor Kevin Friedenstab, he may vote subject to challenge.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted under the direction and supervision of the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those employees in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military service of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by:

LOCAL 406, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO

LIST OF VOTERS⁹

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly, it is hereby directed that **within 7 days** of the date of this Decision, **2** copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. The list must be of sufficient clarity to be clearly legible. The list may be submitted by facsimile transmission, in which case only one copy need be submitted. In order to be timely filed, such list must be received in the **DETROIT REGIONAL OFFICE** on or before **March 12, 2002**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, Franklin Court, 1099 14th Street N.W., Washington D.C. 20570**. This request must be received by the Board in Washington by: **March 19, 2002**.

Section 103.20 of the Board's Rule concerns the posting of election notices. Your attention is directed to the attached copy of that Section.

⁹ If the election involves professional and nonprofessional employees, it is requested that separate lists be submitted for each voting group.